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In This Edition

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Tuesday, August 6, 2013

Administrative Rules Review Committee

9:30 a.m., Committee Room 116, Statehouse

Chairperson: Representative Dawn Pettengill

Vice Chairperson: Senator Wally Horn

Contact Persons: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Agenda: Published in the Iowa Administrative Bulletin:
https://www.legis.iowa.gov/IowaLaw/AdminCode/bulletinSupplementListing.aspx

Internet Page:
https://www.legis.iowa.gov/Schedules/committee.aspx?GA=85&CID=53

LEGAL UPDATES

Purpose. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative affairs of recent court decisions, Attorney General opinions, regulatory actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. As with other written work of the nonpartisan Legislative Services Agency, although this briefing may identify issues for consideration by the General Assembly, nothing contained in it should be interpreted as advocating a particular course of action.

LEGAL UPDATE—LESBIAN MARRIED COUPLES AND BIRTH CERTIFICATES

Filed by the Iowa Supreme Court
May 3, 2013

Gartner v. Iowa Department of Public Health
No. 12-0243, 830 N.W.2d 335 (2013)
http://www.iowacourts.gov/Supreme_Court/Recent_Opinions/20130503/12-0243.pdf

Background Facts. Melissa and Heather Gartner were in a relationship since December 2003, and participated in a commitment ceremony on March 18, 2006. The couple wanted to be parents and agreed that Heather would act as the biological mother, and both would be equal parents to the child. Heather conceived their first child born in 2007, through insemination by an anonymous donor, selected by the couple. Because the couple was not legally married, they went through an adoption procedure to ensure that Melissa was listed on the child's birth certificate. Following the adoption procedure, the Department of Public Health (DPH) listed both Heather and Melissa as parents on the child's birth certificate.

Following the Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) decision, in which Iowa's defense of marriage Act was held unconstitutional, Melissa and Heather married on June 13, 2009. At the time of the marriage, Heather was approximately six months pregnant with the couple's second child, using the same anonymous donor as for their first child. Mackenzie Jean Gartner was born on September 19, 2009. The day after the birth, Heather and Melissa completed a form at the hospital to obtain a birth certificate, indicating that they were both the parents of the child and were legally married. DPH issued the birth certificate naming only Heather as a parent, leaving the second parent space blank. The Gartners responded by sending a letter to DPH requesting that both parties be named parents on the child's birth certificate. The department denied the request, indicating that because the system for registration of births in Iowa recognizes the biological and gendered roles of "mother" and "father" based on the biological fact that a child has only one biological mother and one biological father, in order to place the name of the nonbirthing spouse in a lesbian marriage on the birth certificate, that spouse would have to first adopt the child.

The Gartners filed an initial mandamus action, and subsequent motions, amendments, and refilings, with the district court, which dismissed the mandamus action without prejudice for lack of jurisdiction. The district court indicated that the Iowa Administrative Procedures Act (IAPA) provided the exclusive means for the Gartners to obtain review of the department's decision.

The Gartners then brought an action for judicial review under the IAPA, resulting in the district court ordering DPH to issue the birth certificate naming Melissa as the legal parent. The district court focused on the department's interpretation of Iowa Code §144.13(2), the presumption of parentage statute, and found that DPH had erroneously interpreted the statute and erred in not naming Melissa on the birth certificate. DPH filed a notice of appeal and a motion to stay the district court's ruling. The district court denied the stay as it related to the Gartners' birth certificate, but granted the stay for other birth certificates that DPH may issue for other married lesbian couples during the pendency of the appeal.

Issues. Whether the Iowa Supreme Court (Court) can interpret Iowa Code §144.13(2), the presumption of parentage statute, to require DPH to list as a parent on a child's birth certificate the nonbirthing spouse in a lesbian marriage, when the other spouse conceived the child during the marriage using an anonymous sperm donor. If the Court cannot so interpret the statute, the Court must then determine whether the department's refusal to list the nonbirthing spouse violates the Equal Protection clauses in Article I, sections 1 and 6 of the Iowa Constitution or the Due Process Clause in Article I, section 9 of the Iowa Constitution.

Analysis. The Court determined that relief from administrative agency action could be addressed through both judicial review of the intent of the statute and based upon a determination of the constitutionality of the agency action.

Statutory Interpretation Analysis. An individual adversely affected by administrative agency action is entitled to judicial review. The agency action at issue in this case is DPH's interpretation of the presumption of parentage statute.

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DPH interpreted the terms "husband," "father," and "paternity" to apply only to a male spouse in an opposite-sex marriage, not to a female spouse in a lesbian marriage.

The deference given to an agency to interpret a statute is based on the legislative grant of authority to the agency. If the grant of authority is clearly vested with the agency, the Court may reverse the department's decision only if its interpretation is irrational, illogical, or wholly unjustifiable. If there is not such a clear vesting of authority, the Court may reverse based on an erroneous interpretation of the law.

The Court examined the language the agency was interpreting as well as the specific duties and authority given to the agency to determine the breadth of the agency's vested authority. The fact that the agency has been given rulemaking authority does not give the agency the authority to interpret all statutory language. The Court utilized the standards for determining the scope of the agency's interpretive authority specified in Iowa Code §17A.19(10), and concluded that the Legislature had not expressly vested DPH with the authority to interpret Iowa Code §144.13(2). The department's primary responsibility is to record vital events. Finding that the department had the authority to interpret the statutory terms, "paternity," "father," and "husband," would be overreaching because the terms appear throughout the Code and are not exclusively within the expertise of DPH. Because the department had not been vested by law with the discretion to interpret the statute, the Court should not give deference to the interpretation by DPH of the presumption of paternity statute. Instead, the Court's determination is based on whether the department's interpretation of the law was erroneous.

Review of Iowa's Presumption of Parentage Statute. The requirements for preparing and filing a certificate of birth under the statute include a presumption of parentage that "if the mother was married at the time of conception, birth, or at any time during the period between conception and birth, the name of the husband shall be entered on the certificate as the father of the child unless paternity has been determined otherwise by a court of competent jurisdiction, in which case the name of the father as determined by the court shall be entered by the department." (Iowa Code §144.13(2)).

The presumption of parentage concept originated in common law, derived from two events: a child's birth to its "mother," and the mother's marriage to a man. Legislatures adopted presumption of parentage statutes in order to address social policies including the legitimacy of children which entitled them to financial support, inheritance rights, and filiation obligations of their parents; to promote family stability; and to foster judicial efficiency. State statutes codifying the presumption of parentage fall into three categories: those that use traditional, gendered terms to refer to parents without referencing the parent as natural or biological; those that apply the presumption only when the parent shares a genetic connection to the child and refer to the parent as natural or biological; and those that apply or could apply in a gender-neutral manner or to same-sex spouses. Ten states and the District of Columbia had extended or were in the process of extending the marital parentage presumption to same-sex couples in formalized marriages, civil unions, or domestic partnerships. In Iowa, the presumption applies to counteract the stigma of illegitimacy, to keep the family relationship sacred and preserve peace and harmony in the family, to protect the child even if the marriage later terminates, and to ensure a child's right to financial support, applying the presumption to both marriages formally solemnized and those that meet the requirements for common law marriage.

Interpretation of the Statute. The Court did not agree with the district court's interpretation of the statute requiring the department to list the second parent on the birth certificate. Based on the rules of statutory construction, although Iowa Code §4.1(17) provides that "words of one gender include the other genders," this is only applicable when the statute refers to only one gender and that gender is masculine. When, instead, the statute refers to only one gender and the gender reference is feminine, the scope of the statute does not include males. Finally, when the statute refers to both masculine and feminine words, Iowa Code §4.1(17) does not apply because it changes the plain and unambiguous language and nullifies the intent of the Legislature. In this case, the parentage statute expressly uses both masculine and feminine words by referring to mother, father, and husband. Therefore, Iowa Code §4.1(17) does not apply, or it would change the plain meaning of the statute and nullify the intent of the Legislature.

Additionally, the Court did not agree with the district court's reliance on *Varnum* to change the plain meaning of the statute. In enacting Iowa Code §144.13(2) in 1970, the Legislature chose to use the word "husband." The Court suggested that the Legislature did not consider same-sex marriages at that time and "husband" was an unambiguous term.

Therefore, a statutory construction analysis does not result in a finding that the department erroneously interpreted the statute.

Constitutional Issues Analysis. Because the Court did not find that DPH erroneously interpreted the statute utilizing a statutory analysis basis, the Court next considered a constitutional analysis due to the Court's authority to grant relief from an administrative proceeding if the agency action was unconstitutional. This determination of agency action in-

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volving constitutional questions is de novo. In the district court, the Gartners challenged the constitutionality of the presumption of parentage statute as a violation of their Equal Protection and Due Process rights under the Iowa Constitution. The district court did not decide the case on constitutional grounds, but this basis was preserved for the Court on appeal since the constitutional issues were raised, fully briefed, and argued at the district court level.

Equal Protection. Article I, section 1, of the Iowa Constitution states that "All men and women are, by nature, free and equal." Article I, section 6, provides that "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."

Similarly Situated. Under its equal protection analysis, the Court began with an analysis of whether the law treats all those who are similarly situated with respect to the purposes of the law alike. The purposes for the issuance of birth certificates include to establish the fact of a birth and to verify a person's identity. The threshold question is whether the Gartners are similarly situated to married, opposite-sex couples for the purpose of applying the presumption of parentage statute. If they are, the second step is to determine the level of constitutional scrutiny to apply.

With respect to the registration of birth certificates, the purposes at the state level include to establish the fact that a birth occurred, identify the child for immunization purposes, and verify a person's identity and date of birth. At the federal level, the purposes include to maintain population statistics, confirm a child's identity, and ensure access to federal benefits and programs. With respect to the purpose of Iowa's marriage laws, the Gartners are similarly situated to married, opposite-sex couples, and are in a legally recognized marriage just like opposite-sex couples. Married, lesbian couples, like married, same-sex couples, require official recognition of the identity and verification of the birth of their child. Married, lesbian couples, like married, same-sex couples, require accurate records of their child's birth. Therefore, with respect to the government's purpose of identifying a child as part of their family and providing a basis for verifying the birth of a child, married, lesbian couples are similarly situated to spouses and parents in an opposite-sex marriage.

Classification—Level of Scrutiny. The Gartners argued that the refusal to place both of the spouses' names on the birth certificate classified them based on sex and sexual orientation under the Iowa constitution. DPH argued that the classification was based only on sex. The Court agreed that, as in *Varnum*, the classification was based on sexual orientation rather than sex which requires a heightened level of scrutiny. The heightened level requires a showing that the statutory classification is substantially related to an important government purpose.

Basis for Differing Treatment. The Court found that the statute treats married, lesbian couples who conceive through an anonymous sperm donor differently than married, opposite-sex couples who conceive in the same manner. DPH asserted that the three objectives and interests supporting the statute's differing treatment of married, lesbian and opposite-sex couples include all of the following: the accuracy of birth certificates; the efficiency and effectiveness of government administration; and the determination of paternity.

Accuracy of Birth Certificates. While accuracy in birth records to identify biological parents is laudable, the accuracy of the birth certificate in identifying the biological parents is not always accurate in situations in which the parents are an opposite-sex couple. If the couple is married and uses an anonymous sperm donor, the birth certificate still identifies the male spouse as the biological father. If the parents are a married, lesbian couple who must instead go through the adoption process to list both names on the birth certificate, the birth certificate will still not accurately identify the biological father. Thus, the classification is not substantially related to the governmental purposes of accuracy.

Administrative Efficiency and Effectiveness. DPH argued that it takes valuable resources to reissue a birth certificate when a challenger rebuts the presumption of parentage. The Court found that when an anonymous sperm donor is involved, there will not be a rebuttal of paternity, and even when an anonymous sperm donor is not involved, the presumption of paternity is not rebutted in opposite-sex marriages in a significant number of births. The Court also determined that it is more efficient for the department to presumptively list the nonbirthing spouse on a birth certificate when a child is born to a married, lesbian couple, rather than only list one parent and then reissue the birth certificate after an adoption is complete. The disparate treatment is therefore less effective and efficient, and another reason such as stereotype or prejudice must explain the objective of the state.

Establishing Paternity. With regard to establishing paternity as a means of ensuring financial support of the child and the fundamental legal rights of the father, the Court found that it is equally important for laws to recognize that married, lesbian couples who have children enjoy the same benefits and burdens as married, opposite-sex couples who have children. Official recognition of their status provides the same institutional basis for defining fundamental relational rights and responsibilities as for same sex-couples. The only explanation for not listing the nonbirthing lesbian spouse

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on the birth certificate is stereotype or prejudice. The exclusion of the nonbirthing spouse on the birth certificate of a child born to a married, lesbian couple is not substantially related to the objective of establishing parentage.

Due Process. Because the Court could dispose of the appeal on equal protection grounds, the Court did not address the due process claim.

Holding. The presumption of parentage statute, with its limited application allowing for only "the name of the husband" to appear on the birth certificate, fails to comport with the guarantees of equal protection under Article I, sections 1 and 6 of the Iowa Constitution as applied to married, lesbian couples who have a child born to them during the marriage.

Remedy and Disposition. While the presumption of parentage statute violates equal protection under the Iowa Constitution as applied to married, lesbian couples, the Court did not strike down the statute. Instead, the Court preserved the statute as applied to married, opposite-sex couples and required the department to apply the statute to married, lesbian couples. The Court, with all justices concurring except Justices Mansfield and Waterman, who specially concurred, and Justice Zager, who took no part, affirmed the judgment of the district court ordering the department to issue a birth certificate naming both spouses as parents. The Court remanded the case to the district court to lift the stay regarding birth certificates issued by the department as to other married, lesbian couples pending the appeal, and ordered the district court to remand the case to DPH to issue the birth certificate to the Gartners.

Special Concurrence. Justice Mansfield, with Justice Waterman joining, concurred in the judgment of the case, stating that since the department accepted the decision in *Varnum* and if *Varnum* is the law, the presumption of paternity statute cannot be constitutionally applied to deny the request of Melissa Gartner to be listed as a parent on the birth certificate of the child delivered to her same-sex spouse.

LSA Monitor: Patty Funaro, Legal Services, (515) 281-3040.

LEGAL UPDATE—SCHOOL DISTRICT LIABILITY FOR INJURIES OUTSIDE OF SCHOOL HOURS AND OFF SCHOOL GROUNDS

Filed by the Iowa Supreme Court
June 21, 2013

Mitchell v. Cedar Rapids Community School District
No. 12-0794
http://www.iowacourts.gov/Supreme_Court/Recent_Opinions/20130621/12-0794.pdf

Background. D.E. was a fourteen-year-old ninth-grade special education student at Cedar Rapids Community School District's Kennedy High School. She had an IQ of 67 and functioned on a third grade level. She was rarely without direct adult supervision, although she was capable of independently performing daily living skills. D.E. was presumed by school personnel to be in a relationship with M.F., a nineteen-year-old twelfth-grade special education student. One of the school district's special education teachers had witnessed them kissing, and had concerns that the two were or might become sexually active. D.E. asked for and received permission from her mother to go to a friend's house after school, which was atypical behavior for her. D.E. skipped her last period class and met her friend and M.F. in the school parking lot. From there, D.E. and M.F. eventually made their way to the house of V.M., a tenth-grade special education student. There, M.F. raped D.E. By then, the school day had ended. D.E.'s mother did not discover D.E. was missing until she received a call after the school day had ended from someone who encountered D.E. and M.F. on their way to V.M.'s house. D.E.'s mother eventually tracked down D.E. and M.F. after receiving a call from them. D.E. did not disclose the rape until the following year. M.F. pled guilty to sex abuse in the third degree.

The school district had a computerized system for recording unexcused absences and notifying parents by phone. The notifications take place after the school day. D.E.'s absence was recorded in the system. The school district's special education personnel would often take additional discretionary measures when one of their students was missing, but there is no evidence they did so in this case. There were no special requirements regarding absences in D.E.'s Individualized Education Plan (IEP). D.E.'s mother sued the school district for negligence, alleging various breaches of a duty of reasonable care, including failure to adequately supervise D.E., failure to timely notify D.E.'s mother or take other appropriate action upon discovering her absence, and failure to maintain adequate monitoring and security measures to prevent special education students from leaving school without permission. The jury returned a verdict for D.E., awarding $500,000 in damages and apportioning 70 percent fault to the school district and 30 percent to D.E. The school district made various procedural motions at trial asserting that it did not owe D.E. a duty of

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care, that D.E.'s injuries were outside the scope of its liability, and that its failure to call the police could not have been a cause in fact of D.E.'s injuries and thus should not have been submitted to the jury as a specification of negligence. The district court ruled for D.E. on various substantive and procedural grounds. The school district appealed the district court's rulings on those motions.

Issues on Appeal.

1. Whether the district court erred in denying the school district's motions at trial because the harm caused to D.E. was beyond the school district's scope of liability as a matter of law.
2. Whether a school district owes a duty to protect students from a third party outside the school day, off school grounds, and not during a school activity.
3. Whether the district court erred in including the school district's failure to call the police when D.E. went missing among the specifications of negligence submitted to the jury.

Arguments and Holding.

Scope of Liability. In a 5-2 majority decision, the Iowa Supreme Court (Court) ruled that there was sufficient evidence presented at trial to submit the question of whether the school district was liable for D.E.'s injuries to the jury. The Court rejected the school district's argument that because D.E. was raped outside of school grounds and after school hours, the school district was not as a matter of law liable for the harm she suffered. The Court stated the principle that "an actor's liability is limited to the physical harms that result from the risks that make an actor's conduct tortious." The Court also accepted the general rule that a school's "duty is only applicable to risks arising while a student is at school or otherwise engaged in school activities." However, the Court drew a distinction for "risks arising at school but materializing at some later time." While the harm D.E. suffered was ultimately caused by a third party, M.F., the Court held that that the school district could still be found liable because the kind of harm she suffered was foreseeable by the school district and could have been prevented with proper precautions. The Court found that such determinations are ultimately best made by the jury, which found for D.E. on this issue. The Court also rejected the school district's arguments that D.E. was no more likely to be raped by leaving school early than if she had remained at school until the end of the day. Given D.E.'s low level of functioning, her known relationship with M.F., and the minimal response by the school district to D.E.'s unexcused absence, the Court found sufficient grounds for the question of the school district's liability to be submitted to the jury.

The Court did not rule on a related argument by the school district that the school district's conduct was not a factual cause of the harm caused to D.E. The Court held on procedural grounds that the school district had failed at the trial level to properly preserve the issue for appeal. The Court rejected the school district's argument that its discussion of related issues at trial were sufficient to preserve the question of factual causation for later review.

Duty of Protection. The Court also did not rule on the question of whether a school district owes a duty to protect students from a third party outside the school day, off school grounds, and not during a school activity. The Court held on procedural grounds that the school district had failed at the trial level to properly preserve the issue for appeal. The Court rejected the school district's argument that its discussion of related issues at trial were sufficient to preserve the question of duty for later review.

Failure to Contact Police. The Court rejected the school district's argument that the district court erred in including the school district's failure to call the police when D.E. went missing among the specifications of negligence submitted to the jury. The Court held that the school district's objection to the submission at the trial level was vague and that there was sufficient evidence to submit the matter to the jury.

Concurrence. Chief Justice Cady concurred in the result of the majority's ruling, but on different grounds. He accepted the school district's argument that "a school normally is not responsible for harm to students that occurs after school hours and after the students have left the school property." However, he found that the school district failed to deny at trial the assertion by D.E.'s mother that it owed a duty to notify her of her daughter's unexcused absence before the school day concluded. That issue was then left to the jury, which returned a verdict against the school district. Because the school district had failed to respond at trial to the question of whether it owed a duty during the school day, it could not argue the question on appeal.

Dissent. Justice Waterman filed a dissent, in which Justice Mansfield joined, concluding that he would have ruled that the school district's "tangential role in [D.E.'s] sexual assault by another student after school hours off campus is too attenuated to support liability." He argued that the school district should not be found liable given the facts leading up to D.E.'s assault, noting that she "skipped her last class," "lied to her mother," "willingly accompanied" M.F. off campus,

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and "joined him inside [the] garage where the sexual assault occurred." Given these and other facts on the record indicating D.E. intended to have sex with M.F., he concluded that "her intended liaison with M.F. was likely to occur somewhere, sometime whether or not she skipped her last class," and therefore the school district could not be held liable for the assault. He also noted that D.E.'s IEP did not include any special requirements relating to attendance or parental notification, and therefore the school district would have likely violated federal law relating to special education if it had treated her any differently from other students when she missed a class. He discussed case law from other jurisdictions at some length, concluding that "the great weight of authority holds as a matter of law that schools are not liable for assaults occurring off campus after school hours and outside of school activities," and finding no reason to deviate from that standard. He also argued as a matter of public policy "that to impose liability on schools for crimes occurring when a troubled student skips school would result in higher security costs that divert resources from … education," and that imposing the parental notification requirements D.E.'s mother argued for at trial would impose an "unrealistic burden" on teachers. He did note that the majority's ruling will allow schools to argue the question of whether a school district owes a duty to protect students from a third party outside the school day, off school grounds, and not during a school activity in future cases.

Impact and Applicability on Iowa Law. This case expands the scope of tort liability for Iowa schools. Schools have generally not been held liable for injuries occurring off school grounds and outside of school hours. No prior cases in Iowa have found a school liable under such circumstances. In this case, the Court accepted the general rule that a school's duty of care "is only applicable to risks arising while a student is at school or otherwise engaged in school activities." However, the Court established an exception for liability "risks arising at school but materializing at some later time." The Court did not define the limits of that exception, which will have to be decided in future cases, but the facts of this case establish one example. The school district's failure to respond adequately to a special education student's unexcused absence during the school day made it liable for her assault outside of school grounds and after the school day had concluded. Because the school district in this case failed to preserve certain arguments for appeal, schools in future cases may still be able to argue that, as a matter of law, they owe no duty to prevent injuries occurring off school grounds and outside of school hours.

LSA Monitor: Jack Ewing, Legal Services, (515) 281-6048.

LEGAL UPDATE—INDIAN CHILD WELFARE ACT'S APPLICATION TO PRIVATE ADOPTION
Filed by the United States Supreme Court
June 25, 2013

Adoptive Couple v. Baby Girl
No. 12-399
http://www.supremecourt.gov/opinions/12pdf/12-399_q86b.pdf

Background Facts and Procedure. The biological father of a female Indian child sought custody of his daughter upon notification that his daughter had been put up for adoption by the child's biological mother. The biological father is a member of the Cherokee Nation. The biological father and the biological mother had been in a relationship and the biological father knew of the pregnancy. After the relationship ended, the biological mother asked the biological father via text message if he wanted to pay child support or relinquish his parental rights, and he responded that he would relinquish his rights. The biological mother placed the baby up for adoption and chose a non-Indian adoptive couple from South Carolina to adopt the baby. The adoptive couple was present at the birth of the child in Oklahoma and took custody of the child after the birth. The biological father did not provide any financial or other assistance during the pregnancy or during the four months prior to receiving notification of the adoption proceedings.

The adoptive couple initiated adoption proceedings in South Carolina, and four months after the birth of the baby, the adoptive couple served the biological father with notice of the pending adoption. After realizing he was not relinquishing his rights to the biological mother, the biological father sought custody of the baby, stated he would not consent to the adoption, and took a paternity test.

The South Carolina Family Court denied the adoptive couple's petition for adoption and awarded custody of the child to the biological father, ruling that the adoptive couple had not met the burden required to involuntarily terminate the parental rights of a parent to an Indian child under the federal Indian Child Welfare Act of 1978 (ICWA). After this ruling, the biological father took custody of the then 27-month old child. The South Carolina Supreme Court affirmed the family court's denial of the adoption and the award of custody to the biological father, holding that two provisions of the

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ICWA barred termination of the biological father's parental rights.

Issues on Appeal.

1. Whether the ICWA requirement in 25 U.S.C. § 1912(f) that a state court must make a determination supported by evidence beyond a reasonable doubt that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage before allowing an involuntary termination of parental rights to an Indian child applies when the biological parent of the Indian child has never had legal or physical custody of the child.
2. Whether the ICWA requirement in 25 U.S.C. § 1912(d) that a party seeking to involuntarily terminate the parental rights to an Indian child must demonstrate that active efforts have been made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family and those efforts have failed applies when the biological parent of an Indian child has never had legal or physical custody of the child or has abandoned the child.

Analysis and Holding. The United States Supreme Court (Court) held in a 5 to 4 decision that 25 U.S.C. § 1912(f) of the ICWA does not apply to bar the termination of parental rights when the biological parent of an Indian child has never had legal or physical custody of the child under state law and 25 U.S.C. § 1912(d) does not apply to bar the termination of parental rights when the biological parent of an Indian child has never had legal or physical custody of the child or has abandoned the child.

Serious Emotional or Physical Harm. Section 1912(f) of the ICWA bars the state from involuntarily terminating the rights of a parent of an Indian child in the absence of a heightened showing that serious harm to the Indian child is likely to result from the parent's "continued custody" of the child. The Court held that this provision does not apply when that parent never had custody of the child, as the term "continued custody" refers to a preexisting state or a resumption of custody after interruption. Therefore, for this provision to apply, the parent has to currently have custody of the child or has to have had custody of the child in the past. As the biological father in the case had never had physical or legal custody of the child under South Carolina or Oklahoma law, the Court found the father could not invoke this provision of ICWA to bar the termination of his parental rights.

Remedial Services and Rehabilitative Programs. The other ICWA provision concerning termination of parental rights at issue in this case, 25 U.S.C. § 1912(d), requires that a party seeking to involuntarily terminate the parental rights to an Indian child demonstrate that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and the active efforts were unsuccessful. The Court determined this ICWA provision which conditions the termination of parental rights on a showing of unsuccessful remedial services and rehabilitative programs also does not apply when the parent abandoned the Indian child before birth and never had custody of the child. The Court stated that this provision only applies in cases where an Indian family's "breakup" would be triggered by the termination of parental rights. If the parent has abandoned the child prior to birth and the child has never been in the parent's legal or physical custody, the termination of parental rights would not break up or discontinue the relationship.

The Court stated that the termination of parental rights provisions in ICWA do not create parental rights for unwed fathers where the rights would not otherwise exist. The Court also commented that allowing a biological Indian father to abandon a child and refuse to support the birth mother and then allow ICWA provisions to override the child's best interests and the mother's decision to place the child up for adoption would raise equal protection concerns.

The Court also noted that placement preferences for the adoption of Indian children under the ICWA do not prevent a non-Indian family from adopting an Indian child when, as in this case, no other eligible candidate sought to adopt the child.

Concurrence. Two concurrences were filed in this case. Justice Thomas concurred in the majority's result because the result avoided constitutional issues relating to Congress's plenary power to subsume state child custody proceedings on the basis of ICWA. Justice Breyer concurred in the majority's result, but noted that there is a policy risk that the Court excluded too many fathers because the category of absentee fathers may be too broad. Justice Breyer also noted that the majority's holding does not implicate cases where the father has visitation rights or paid child support, or a case where the biological father was deceived about the existence of a child or was prevented from seeing the child.

Dissent. Two dissents were filed in this case. In his dissent, Justice Scalia argued that the majority misinterpreted the term "continued custody" to require an already existing custodial relationship or a past custodial relationship when "continued custody" could mean that a parent's initial custody in the future is not likely to result in damage to the Indian child and the continued custody beyond that initial custody is also unlikely to result in damage to the child. In the sec-

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ond dissenting opinion, in which Justice Scalia joined, Justice Sotomayor argued that the majority did not interpret the ICWA provisions regarding termination of parental rights as a whole, but instead looked at it piecemeal and focused on the phrases "continued custody" and "breakup of the Indian family," thereby negating Congress's purpose in enacting ICWA, which she states was to preserve familial bonds between Indian parents and their children and the Indian tribes' relationships with future citizens. Justice Sotomayor argued that the definition of "custody" should not be narrowly defined as only a custodial relationship since the rest of the statute and the ICWA as a whole use broad definitions when referring to custody proceedings. Justice Sotomayor also noted that as the majority did not narrowly exclude the fathers for whom certain ICWA provisions do not apply, all noncustodial fathers would be denied protections under the majority's ruling regardless of the father's involvement in the Indian child's life. Justice Sotomayor's dissent would affirm the South Carolina Supreme Court and find that 25 U.S.C. § 1912(d) and (f) bar the termination of the biological father's parental rights.

Impact on Iowa Law. Iowa Code chapter 232B, the Iowa Indian Child Welfare Act, was enacted to clarify state policies and procedures for implementing the federal ICWA. Iowa Code §232B.6 mirrors the federal ICWA provisions at issue in this case. As such, the interpretation of the United States Supreme Court in this case would likely control in Iowa as well. Noncustodial parents or absentee parents likely will not be able to invoke the rights of the Iowa Indian Child Welfare Act to prevent termination of parental rights to an Indian child under federal law or Iowa law. The Breyer concurrence contends the majority's ruling did not foreclose the option that a noncustodial parent who is active in the Indian child's life may still receive ICWA protections against the termination of parental rights, but future state custody cases will need to determine how broadly or narrowly to construe the majority holding from this case.

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